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IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1990

CLARK LESTER,

Petitioner

vs.

GENE BORGERT, Warden,
Cotton Correctional Facility,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner Clark Lester was tried for first-degree premeditated murder and denied being the killer. The shooting occurred during an altercation after a traffic incident. In a jury trial involving instructions claimed to be unconstitutional, the jury found that Petitioner was the killer, and that the degree of homicide was first-degree murder.

Question 1: Does a court unconstitutionally shift the burden of proof by instructing the jury that elements of the crime are presumed or implied by law?

Question 2: Did the rules regarding instructions which shift the burden of proof first arise in *Sandstrom v. Montana* in 1979, or did they arise earlier?

Question 3: Does *Sandstrom v. Montana* constitute an "explicit and substantial break with prior precedent" as is required to implement the nonretroactivity principle of *Teague v Lane*?

Question 4: Does the right to jury instructions which do not presume elements of the offense involve "procedures that are implicit in the concept of ordered liberty" under *Teague v. Lane*?

Question 5: Do jury instructions which misdefine the element of premeditation and wrongly eliminate the distinction between first and second degree murder constitute a federal due process violation?

Question 6: Does a federal court properly deny a motion for certificate of probable cause on the ground of harmless error, where the harmlessness of the error is subject to legitimate dispute?

Question 7: Does a defendant, by denying that he committed the killing, waive the right to complain of unconstitutional instructions that elevate the level of homicide, and thereby render all instructional error harmless?

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Clark Lester, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, issued January 25, 1991.

OPINIONS BELOW

The ruling of the Sixth Circuit Court of Appeals of January 25, 1991 is attached as Appendix A. The opinion of the United States District Court for the Eastern District of Michigan of October 12, 1990 is attached as Appendix B. The Magistrate's Report and Recommendation is attached as Appendix C.

STATEMENT OF JURISDICTION

This case was filed in U.S. District Court as a Petition for Writ of Habeas Corpus for a state prisoner being held in violation of the constitution of the United States, with jurisdiction attaching under 28 U.S.C. §2254. Habeas corpus relief was denied. A Certificate of Probable Cause to Appeal was denied.

The final judgment of the U.S. Court of Appeals for the Sixth Circuit denying a Certificate of Probable Cause to Appeal and thereby affirming the District Court was entered January 25, 1991. This Court has jurisdiction to entertain a Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

M.C.L. (Michigan Compiled Laws) 750.316 provides:

"Murder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping, is murder of the first degree, and shall be punished by imprisonment for life."

STATEMENT OF THE CASE

Petitioner Clark Lester is presently serving a sentence of life imprisonment in a Michigan state prison upon his conviction for first degree premeditated murder, pursuant to M.C.L. 750.316. A variety of appeals in state court failed, as did his recent Petition for Habeas Corpus in federal court.

This case arose out of a fatal shooting on February 22, 1968. The prosecution argued that Petitioner shot and killed Robert Ray after a near collision between a vehicle allegedly driven by Clark Lester and a vehicle driven by the decedent. (T 385-387). The defense argued that Clark Lester was not driving the car and was not the person who shot and killed Robert Ray. (T 388-389).

On February 22, 1968, Robert Ray left Ypsilanti High School with Leo Kinsel and Richard Spangler after playing basketball. (T 98, 129). Mr. Ray, Mr. Kinsel and Mr. Spangler left high school at approximately 9:00 p.m., intending to go to the Huron Inn. (T 98). While enroute from the high school to the Huron Inn, there was nearly a collision between the car driven by Mr. Ray and another vehicle. (T 99, 129-130). The driver of the second vehicle and Mr. Ray exchanged "the finger." (T 99). Mr. Ray proceeded on his way, while the second vehicle turned around and approached Mr. Ray's vehicle from the

rear. (T 100, 131). Mr. Ray pulled his vehicle to the curb, and the second vehicle pulled along side. (T 101, 132). Prior to the shot being fired, Mr. Ray had inquired of the occupants of the second vehicle what he could do for them, or what was wrong. (T 101, 132).

Mr. Kinsel stated that there were 2 people in the second vehicle (T 100), and that the vehicle was a late model Chevrolet, was very dirty and was either blue or green in color. (T 100). He described the driver of the vehicle as having long hair and wearing glasses. (T 100).

Mr. Spangler stated that there were 2 people in the other vehicle, (T 130), and that the vehicle was a 1966 Impala Chevorlet, light blue or green in color, and four-door (T 133). He further stated that the driver had an angular, long face, was wearing glasses, had a vacant look on his face, and had somewhat long hair. (T 133-134).

John Larry Slone testified that he was a coworker with Clark Lester at Garwood Industries in Ypsilanti, and that he left his place of employment with Clark Lester at about 9:15 p.m. on February 22, 1968. (T 157-160). He further stated that they left Garwood Industries in Clark Lester's car, and that Clark Lester was driving when they left. (T 161). He stated that there was nearly a collision between the car driven by Mr. Lester and another vehicle, (T 161), that after the near collision Mr. Lester and the driver of the other

vehicle exchanged "the finger," and that Mr. Lester then pursued the second vehicle. (T 161-162).

According to Slone, while Mr. Lester was pursuing the second vehicle, he was getting his gun from under the seat. (T 163). Mr. Slone testified that Mr. Lester told him to roll down the window, that Slone did so, and that Petitioner Lester then shot the driver of the other vehicle. (T 163-164).

According to Mr. Slone, after the shooting Mr Lester instructed him not to say anything about the shooting that evening, (T 165). Slone testified that he and Petitioner Lester washed Mr. Lester's car the next morning. (T 166). Mr. Slone testified that Clark Lester drove a blue 1966 Chevrolet with no hub caps. (T 174-175).

John Larry Slone admitted that his brother Jackie Slone drove a vehicle exactly the same in appearance as that of Mr. Lester. (T 175). He testified that his brother Jackie Slone was dating a woman named Jeanette Clement, (T 189), that Jeanette Clement's husband had inquired whether Mr. Slone's brother was fooling around with his wife (T 197), and that Mr. Slone's brother had borrowed Clark Lester's vehicle on both the day before and the day of the fatal shooting (T 198) and that Jeanette Clement's husband had followed Slone's brother (in Clark Lester's car) on the day of the shooting, (T 198). Mr. Slone further stated that Jeanette Clement's husband drove a dark 1964

Ford when following his brother. (T 197). Finally, Mr. Slone stated that his brother, like Clark Lester, wore glasses, (T 198), and was slender. (T,169).

The remaining prosecution witnesses provided testimony of the details of the investigation and the cause of death of Robert Ray.

Four witnesses testified for the defense. Agnes King, as well as W.R. King, testified that Clark Lester had arrived at his residence at about 9:40 p.m. on the evening of the shooting, (T 214), and that he had his car with him. Agnes King testified that on February 23, 1968, the vehicle was clean, (T 217), and that Clark Lester had been with her on the morning of February 23, 1968. (T 217). W.R. King said essentially the same thing

Clark Lester testified that on February 22, 1968, he had gone to worked in a car owned by Jackie Slone (Jackie Slone is the brother of witness John Larry Slone), (T 240), that Jackie Slone had possession of the vehicle owned by Clark Lester, (T 240). Mr. Lester denied shooting anyone on February 22, 1968. (T 246).

The issues raised relate to jury instructions, which are excerpted infra.

REASONS FOR GRANTING THE WRIT

Question 1: Does a court unconstitutionally shift the burden of proof by instructing the jury that elements of the crime are presumed or implied by law?

Petitioner submits that the trial court acted unconstitutionally when it instructed the jury that the element of malice was "presumed." The courts have repeatedly held that malice is a permissive inference for a jury under proper instructions, and is never to be the subject of a presumption. *Maher v. People*, 10 Mich. 212, 218 (1862); *People v. Martin*, 392 Mich. 553, 561 (1974); *Mullaney v. Wilbur*, 421 U.S. 684; 95 S.Ct. 1881; 44 L.Ed.2d 508 (1975).

That the jury is to place the burden of proof on the prosecution is a fundamental requisite of due process. *Mullaney v. Wilbur*, supra; *Francis v. Franklin*, 471 U.S. 307; 105 S.Ct. 1965; 85 L.Ed.2d 344 (1985); *In Re Winship*, 397 U.S. 358; 90 S.Ct. 1068; 20 L.Ed.2d 368 (1970); *Morissette v. United States*, 342 U.S. 246; 72 S.Ct. 240; 96 L.Ed. 288 (1952). It therefore denies due process to give instructions that have "the effect of relieving the State of the burden of proof." *Francis v. Franklin*, supra.

In *Sandstrom v. Montana*, 442 U.S. 510; 99 S.Ct. 2450; 61 L.Ed.2d 39, 48 (1979), the Court held it was reversible constitutional error to give an instruction

that could possibly be construed by the jury as shifting the burden of proof.

Petitioner Clark Lester was convicted of first degree premeditated murder and was sentenced to life in prison on July 19, 1968. It was alleged that Mr. Lester shot Robert Ray after a car driven by Ray nearly collided with another car, and Ray gave the driver of the other car a gesture known as "the finger." The driver of the other car shot Mr. Ray when Mr. Ray got out of his car. It was alleged that Petitioner Lester was the other driver who shot Mr. Ray.

The facts of the sudden shooting following the altercation suggest that a rational jury could find that Petitioner Lester committed the shooting, yet not find the case to have been murder in the first degree or murder at all.

Michigan law requires "malice" as an element of the offenses of first and second degree murder. *People v. Hansen*, 368 Mich. 344 (1962); *People v. Aaron*, 409 Mich. 672 (1980); *People v. Woods*, 416 Mich. 581 (1982). In *People v. Hansen*, supra, the Court stated:

> "Malice requires an intent to cause the very harm that results or some harm of the same general nature, or an act done in wanton or wilful disregard of the plain and strong likelihood that some such harm will result. It

requires also on the negative side the absence of any justification, excuse, or recognized mitigation."

The trial judge, in his instructions to the jury on the charges of first degree murder and second degree murder, defined the elements of malice as follows (T 394-396):

"What I am stating you is the term 'malice' as used in these definitions signifies a wrongful act done intentionally without legal justification or excuse.

The test of malice is to be found in the presence or absence of adequate cause or provocation to act for a homicide.

Possibly I could explain it better by giving you this type of an example: If one without just cause inflicts a wrong upon another, we call him malicious, so when one without any legal provocation, justification or excuse intentionally kills another, we call him a murderer.

The law implies from an unprovoked or unjustifiable killing the existence of that wicked disposition which the law terms malice aforethought.

If a man kills another suddenly and without provocation, the law implies malice and the offense is murder.

If the provocation is such as to greatly provoke the killing would be manslaughter.

I will instruct you that the instrument with which a killing was done may be taken into consideration by the jury, because **the intention to kill in the absence showing a contrary intent may be inferred from the use of a deadly weapon in such a manner that the death of a person assaulted would be the inevitable consequence.**

The law presumes that every person, unless relieved by some disability, contemplates and intends the natural ordinary, and usual consequences of his voluntary act, unless of course, the contrary appears from the evidence.

I will state that if a man is shown by the evidence beyond a reasonable doubt to have killed another by the act of natural and ordinary consequences of which would be to produce death, **then it would be presumed that death of the deceased was designed by the slayer unless the facts and circumstances of the killing or the evidence creates a reasonable doubt in your minds whether the killing was done purposely.**

I would instruct you that when a man assaults another with a dangerous weapon, a deadly weapon, in such a manner that the natural, ordinary and probable use of such deadly weapon would take life, the law presumes that

such person so assaulting intended to take life."

In *Sandstrom*, the Supreme Court held the following instruction to constitute reversible constitutional error:

> "the law presumes that a person intends the ordeinary consequences of his voluntary acts."

The instruction held constitutionally deficient in *Sandstrom* cannot meaningfully be distinguished from the instruction in the instant case that:

> "The law presumes that every person, unless relieved by some disability, contemplates and intends the natural ordinary, and usual consequences of his voluntary act, unless of course, the contrary appears from the evidence." (T 395).

It has been expressly held that a burden shifting instruction is not cured by an instruction that the presumption can be rebutted or overcome with evidence. *Sandstrom*, supra, 61 L.Ed.2d at 46-47; *Francis v. Franklin*, supra, 85 L.Ed.2d at 355. As the Court stated in *Francis*:

"The language challenged here differs from Sandstrom, of course, in that the jury in this case was explicitly informed that the presumptions 'may be rebutted.' App 8a-9a. The State makes much of this additional aspect of the instruction in seeking to differentiate the present case from Sandstrom. This distinction does not suffice, however, to cure the infirmity in the charge...

A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional. Our case make clear that 'such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.'"

The Court in *Francis v. Franklin* found that instructions were unconstitutional because they:

"could reasonably be read as telling the jury that it was required to infer intent to kill as the natural and probable consequence of the act of firing the gun unless the defendant

persuaded the jury that such an inference was unwarranted."

In the instant case, the instructions do not have to be "reasonably read" as involving the prohibited presumptions, because they directly state the prohibited presumptions:

1. "The law presumes that every person, unless relieved by some disability contemplates and intends the natural ordinary, and usual consequences of his voluntary act, unless, of course, the contrary appears from the evidence." (T 395).

2. "if a man is shown by the evidence beyond a reasonable doubt to have killed another by the act of natural and ordinary consequences of which would be to produce death, then it would be presumed that death of the deceased was designed by the slayer unless the facts and circumstances of the killing or the evidence creates a reasonable doubt in your minds whether the killing was done purposely." (T 395-396).

3. "when a man assaults another with a dangerous weapon, a deadly weapon, in such a manner that the natural, ordinary and probable use of such deadly weapon would take life, the law presumes that such person so assaulting intended to take life." (T 396).

Considering that the charge of first degree murder requires actual intent to kill, *People v. Garcia*, 398 Mich. 250 (1976); *People v. Potter*, 5 Mich. 1, 8 (1858), an instruction that presumes intent to kill, such as example 3, is even more unfair than the patently unconstitutional examples 1 and 2.

Petitioner submits that an instruction that "the law presumes that such person so assaulting intended to take life," (T 396), qualified under *Francis v. Franklin* as a statement that "could reasonably be read as telling the jury that it was required to infer intent to kill as the natural and probable consequence of the act of firing the gun unless the defendant persuaded the jury that such an inference was unwarranted."

"Jury instructions on the burden of proof must not be so vague or ambiguous to permit the jury to apply the wrong standard." *United States v. Patel*, 762 F.2d 784, 790 (9th Cir. 1985). The instant jury instructions "had the effect of relieving the State of the burden of proof," *Francis v. Franklin*, supra, and would "permit the jury to apply the wrong standard." *United States v. Patel*, supra.

In this case there was no objection to the improper instruction. In *Mullaney v. Wilbur*, the Supreme Court held that the instruction shifting the burden of proof meant that the conviction should be reversed, even though there was no objection at trial to the faulty instruction. 421 U.S. at 704. Similarly,

under Michigan law objection is not needed to preserve an instructional error under *Sandstrom v. Montana*. *People v. Richardson*, 409 Mich. 126 (1980); *People v. Wright*, 408 Mich. 1 (1980); see also *People v. Butler*, 413 Mich. 377, 386 (1982); *People v. Henry*, 395 Mich. 367, 373-374 (1975). Petitioner would conclude that, in a Michigan case, there is no requirement of an objection when there is an instruction shifting burden of proof.

In this case, it was alleged that Petitioner shot a person he just met, as an outgrowth of an angry confrontation. Such a case will not always be first degree murder. A legal presumption of intent to kill, provided to the jury, presumes an element of the offense, and calls into play the observation of the Court in *Speiser v. Randall*, 357 U.S. 513, 525-526; 78 S.Ct. 1332; 2 L.Ed.2d 1460 (1958):

> "In all kinds of litigation is is plain that where the burden of proof lies may be decisive of the outcome...
>
> Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt."

In a case involving complex elements of intent, the instructions tending to shift the burden of proof on intent and related matters fatally infected the trial.

Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). Defendant's convictions by a jury misinstructed on the fundamental principle of burden of proof, and given unlawful presumptions on elements of the offense, denied due process of law. U.S. Const., Amend. XIV. Habeas corpus relief should therefore be granted.

Question 2: Did the rules regarding instructions which shift the burden of proof first arise in *Sandstrom v. Montana* in 1979, or did they arise earlier?

Question 3: Does *Sandstrom v. Montana* constitute an "explicit and substantial break with prior precedent" as is required to implement the nonretroactivity principle of *Teague v Lane*?

Question 4: Does the right to jury instructions which do not presume elements of the offense involve "procedures that are implicit in the concept of ordered liberty" under *Teague v. Lane*?

Relying on *Teague v. Lane*, 489 U.S. ___; 109 S.Ct. 1060 (1989) the District Judge rejected Petitioner's issue 1 on the ground that *Sandstrom v. Montana* cannot be applied retroactively to Mr. Lester's 1968 trial.

However, as the Court noted in *Yates v. Aiken*, 484 U.S. ___; 108 S.Ct. 534; 98 L.Ed.2d 546 (1988), the rule prohibiting burden-shifting presumptions did not originate with *Sandstrom*, but rather has been recognized by American jurisprudence for years in cases such as *Mullaney v. Wilbur*, 421 U.S. 684; 95 S.Ct. 1881; 44 L.Ed.2d 508 (1975); *In Re Winship*, 397 U.S. 358; 90 S.Ct. 1068; 20 L.Ed.2d 368 (1970); and *Morissette v. United States*, 342 U.S. 246; 72 S.Ct. 240; 96 L.Ed. 288 (1952). Therefore, retroactivity is not an issue as to this 1968 trial.

However, even if retroactivity of *Sandstrom* were an issue, *Sandstrom* is fully retroactive. *Burton v. Bergman*, 649 F.2d 428 (6th Cir. 1981); *Conway v. Anderson*, 698 F.2d 282 (6th Cir. 1983); see also *Yates v. Aiken*, supra, where the Supreme Court applied *Sandstrom* to a case tried before *Sandstrom*.

The District Judge declared that *Sandstrom* applies a new rule of law, overlooking that *Morissette v. United States* long predates Petitioner's trial and applies the same rule of law. *Sandstrom* was not an "explicit and substantial break with prior precedent" as is required to implement the nonretroactivity principle of *Teague v Lane*. Whether or not *Sandstrom* is retroactive, habeas relief should be granted based on *Morissette*.

Also, the District Judge overlooked the importance of the constitutional right in question, the

right not to have the judge direct a verdict against a criminal defendant. This right is so fundamental that under *Teague v. Lane* it could be considered even if *Sandstrom* did announce a new rule of law and even if *Morissette* had never been decided. *Teague* holds that its principle of nonretroactivity does not apply to cases involving "procedures that are implicit in the concept of ordered liberty." 109 S.Ct. at 1075. It is implicit in the concept of ordered liberty that a jury decide whether elements of the offense are proven. For the judge to take away the power of the jury to decide such questions is to vitiate the fundamental right to a jury trial, which must be considered to be implicit in the concept of ordered liberty.

This case involves one of the first applications of the nonretroactivity principle, and its exceptions, which this court announced in *Teague v. Lane*. Due to the importance of the issue, this case is appropriate for certiorari to be granted.

Question 5: Do jury instructions which misdefine the element of premeditation and wrongly eliminate the distinction between first and second degree murder constitute a federal due process violation?

The District Court held that misinstructing on

elements of the offense does not present a federal issue. However, courts have repeatedly held that jury instructions that mislead the jury on what is required for conviction on an offense violate the due process clause of the Fourteenth Amendment, and constitute reversible error. *Berrier v Egeler*, 583 F2d 515 (CA 6, 1978); *Glenn v Dallman*, 686 F2d 418 (CA 6, 1982); *Hoover v Garfield Heights Municipal Court*, 802 F2d 168 (CA 6, 1986). Where instructions tend to presume an element of the offense, they shift the burden of proof and are unconstitutional. *In Re Winship*, 397 US 358, 391; 90 S Ct 1068; 25 L Ed 2d 363 (1970). Under Michigan law, objection is not needed to preserve the error. *People v. Allensworth*, 401 Mich. 67 (1977); *People v Butler*, 413 Mich 377, 386 (1982); *People v Henry*, 395 Mich 367, 373-374 (1975); *People v Townes*, 391 Mich 578 (1974).

In the instant case, the trial court instructed the jury as follows:

> "The difference between murder in the first degree and murder in the second degree is this: murder in the first degree is a killing willfully with premeditation while murder in the second degree, the length of premeditation is absent; so to convict a Respondent of murder in the first degree, it must appear that the killing was wilful and premeditated.
>
> **It is not necessary that any definite**

> **period of time should have elapsed between the forming of such intention and killing**, providing the killing was premeditated and the Respondent acted willfully. (T 391).

It is clear that while the judge instructed the jury that "premeditation" was a necessary element for first degree murder, he failed to tell the jury what premeditation means. Accordingly, the jury sent the judge a note that said: "The jury would like another definition of premeditated, if possible." (T 413).

The Court responded to the request by making the following comments (T 415-416):

> "If you believe from testimony beyond a reasonable doubt that the Respondent at the time charged in the information willfully and lawfully killed Robert Ray with malice aforethought either express or implied under the definition that I gave you previously, that is, **that he had thought the matter out and reached a conclusion regardless of the length of time during which he entertained it**, that he would kill Robert Ray or would inflict upon him some great bodily harm less than the crime of murder but which from the nature of the the instrument and the manner of its use might seriously involve the life of Robert Ray, **then your verdict should be that he is guilty of**

> **murder in the first degree**." (Emphasis added) (T 415-416).

The instruction in the instant case clearly misdefined the elements of the offense. In *People v Milton*, 81 Mich App 515, 518 (1978), the Court stated:

> "Another fatal flaw in the instrructions was their failure to define the elements of premeditation and deliberation. These elements distinguish first degree murder from second degree murder. *People v Vail*, 393 Mich 460, 468; 227 NW2d 535 (1975). Failure to define these elements independently of malice has the effect of abolishing the differences between first degree murder and second degree murder. [cites omitted]."

In *Austin v United States*, 382 F.2d 129 (DC App. 1967), citing to *Fisher v. United States*, 328 US 463, 469-470 n. 3; 66 S Ct. 1318; 90 L Ed 1382 (1946), the Court gave approval of general instructions where premeditation and deliberation were defined carefully, so as to include an instruction that deliberation requires that an appreciable time lapse between formation of the design and the fatal act within which there is, in fact deliberation. The Court stated:

> "Deliberation requires that an appreciable time lapse between formation of the design and the fatal act within whcih there is, in fact, deliberation...
>
> The necessary time element was emphasized and the jury was told that premeditation requried a preconceived design to kill, a 'second thought.'"

In this case, the judge told the jury that premeditation meant that the defendant "reached a conclusion regardless of the length of time during which he entertained it." (T 415). In so instructing, the trial court hopelessly blurred the distinction between first and second degree murder. It is not enough to reach a decision to shoot; the decision must be made, thought over, and reaffirmed, before any premeditation has taken place. The instruction that "reaching a conclusion" constitutes premeditation means that any intention to shoot is premeditation, whether or not there was a second consideration. This was manifestly improper.

The issue of premeditation was an important issue in the trial. The circumstances of the case suggested a sudden shooting after a traffic altercation. The jury specifically requested reinstruction on premeditation, indicating that this was a matter of concern and confusion to them. The incorrect instructions equating premeditation with any intentional act

therefore fatally infected the trial. *Henderson v. Kibbe*, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). Certiorari should therefore be granted.

Question 6: Does a federal court properly deny a motion for certificate of probable cause on the ground of harmless error, where the harmlessness of the error is subject to legitimate dispute?

Question 7: Does a defendant, by denying that he committed the killing, waive the right to complain of unconstitutional instructions that elevate the level of homicide, and thereby render all instructional error harmless?

The Court of Appeals denied a certificate of probable cause on the ground that any error was harmless.

A finding of harmless error was extremely inappropriate on this record. The Court of Appeals found harmless error because Defendant testified he did not commit the shooting. However, by denying committing the shooting, the Defendant did not waive the requirement that he be convicted of first degree murder only if the elements of first degree murder are shown. *Johnson v. Zerbst*, 304 U.S. 458; 58 S.Ct. 1019; 82 L.Ed. 1461 (1938).

Under Michigan law, a defendant may maintain inconsistent defenses. *People v. Hansma*, 84 Mich App 138, 145 (1978). A defendant may properly deny involvement in the killing, while maintaining his right to have the **degree** of homicide properly determined in the event the jury finds he was the killer.

In this case, the evidence strongly suggests that the killing was a killing of a stranger done suddenly during a traffic incident. Such a killing cannot reasonably be considered as planned or premeditated, and would not have resulted in a first degree murder conviction but for the presumptions. The record strongly suggests that despite the jury's finding that Petitioner shot the deceased, that Petitioner is actually innocent of the charge of **first-degree** murder on which he remains incarcerated. Issues relating to the actual guilt or innocence of the accused of the charged crime have a preferred position in habeas corpus jurisprudence, and avoid the nonretroactivity rules of *Teague v. Lane*. *Teague*, 109 S.Ct. at 1076; *Kuhlmann v. Wilson*, 477 U.S. 436, 454; 106 S. Ct. 2616; 91 L.Ed.2d 364 (1986).

The District Judge made many novel rulings of law which are obviously deserving of review under *Barefoot v. Estelle*, 463 U.S. 880; 103 S.Ct. 3383; 77 L.Ed.2d 1090 (1983), because jurists of reason could indeed resolve them differently.

1. The District Judge rejected Petitioner's issue 1 on the ground that *Sandstrom v. Montana* cannot be applied retroactively to Mr. Lester's 1968 trial. However, this ruling conflicts with other rulings holding *Sandstrom* to be fully retroactive.

2. The District Judge declared that *Sandstrom* applies a new rule of law, overlooking that *Morissette v. United States* long predates Petitioner's trial and applies the same rule of law. Sandstrom was not an "explicit and substantial break with prior precedent" as is required to implement the nonretroactivity principle of *Teague v Lane.*

3. The District Judge overlooked the importance of the constitutional right in question, the right not to have the judge direct a verdict against a criminal defendant. This right is so fundamental that under *Teague v. Lane* it could be considered even if *Sandstrom* did announce a new rule of law and even if *Morissette* had never been decided. *Teague* holds that its principle of nonretroactivity does not apply to cases involving "procedures that are implicit in the concept of ordered liberty." 109 S.Ct. at 1075. It is implicit in the concept of ordered liberty that a jury decide whether elements of the offense are proven. For the judge to take away the power of the jury to decide such questions is to vitiate

the fundamental right to a jury trial, which must be considered to be implicit in the concept of ordered liberty.

4. The District Judge ruled that jury instructions on the elements of an offense do not present a federal question, contrary to the holdings of many federal court cases.

Because *Teague v. Lane* is a relatively new decision, and because there is no appellate court authority interpreting *Teague* which supports Judge Gilmore's interpretations of *Teague*, it cannot be said that all jurists would necessarily agree with his positions.

Each of the issues raised allege the denial of federal rights. The above show that there are substantial, non-frivolous federal issues to be decided, and that the federal claims raised are "debatable among jurists of reason; that a court could resolve the issues" in a different manner. *Barefoot v. Estelle*, 463 U.S. 880; 103 S.Ct. 3383; 77 L.Ed.2d 1090 (1983).

Because the question of whether verdict-directing instructions can be raised in habeas corpus proceedings is subject to honest dispute, a certificate of probable cause should be issued. The denial of the certificate amounts to a ruling that no reasonable jurist could find that directing a verdict implicates values "implicit in the concept of ordered liberty." It

amounts to a finding that *Sandstrom* announces a new rule of law, and that no reasonable person could disagree. To say that there are no issues to be litigated here is absurd. Determining the standards for granting or denying a certificate of probable cause is an issue of jurisprudential significance directly presented by this case.

Conclusion.

Petitioner Clark Lester respectfully submits that for the above reasons, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

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Dated: April 5, 1991

NO. 90-2268
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARK LESTER,	)	Filed
	)	JAN 25 1991
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
GENE BORGERT, Warden, Cotton Correctional Facility,	)	
	)	
Respondent-Appellee.	)	

Clark Lester moves for a certificate of probable cause on appeal from the district court's denial of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254.

Following a jury trial, Lester was convicted of first-degree murder in the Washtenaw County, Michigan, Circuit Court in July, 1988. (sic) Lester was sentenced to life imprisonment. The Michigan Court of Appeals affirmed the conviction on appeal and the Michigan Supreme Court denied leave to appeal. Thereafter two state post-conviction motions were denied.

Next, petitioner filed his habeas petition in the district court alleging: (1) the trial court gave an impermissible burden shifting instruction to the jury in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979); (2) ineffective assistance of counsel; and (3) the trial court gave an improper jury instruction defining premeditation. The district court adopted the magistrate's recommendation that the petition be denied over petitioner's objections. Upon consideration, we

shall deny the motion for a certificate of probable cause.

Even assuming arguendo that the instruction in question violates the rule announced in *Sandstrom* and that the *Sandstrom* rule is to be applied retroactively, such an error is harmless where, as here, the question of intent to kill is not in issue. *See Cook v. Foltz*, 814 F.2d 1109, 1112-13 (6th Cir.), *cert. denied*, 484 U.S. 837 (1987). Petitioner's remaining claims do not present a substantial issue warranting further review.

Accordingly, the motion for a certificate of probable cause is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Jr.
Clerk

U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CLARK LESTER,
Petitioner,

v.

CIVIL NO. 90-2420
JUDGE HORACE W. GILMORE

GENE BORGERT,
Respondent.
_____/

MEMORANDUM OPINION AND ORDER

Before the Court are Petitioner's Objections to the Magistrate's Report and Recommendation, which recommended that the Court deny the Petition for Writ of Habeas Corpus.

Petitioner, represented by counsel, filed a petition for write of habeas corpus, claiming that the trial judge unconstitutionally shifted the burden of proof to him by instructing the juty that certain elements of the crime were presumed or impolied by law, and that the judge's instruction on premeditation also shifted the burden of proof. The Magistrate rejected Petitioner's claims, determining first that the instructions challenged in this case were distinct from those challenged in the case on which Petitioner relied, Sandstrom v. Montana, 442 U.S. 510, 513 (1979). In this case, though the trial judge repeatedly used the word presumed, he also repeatedly added qualifying language. More important, the Magistrate determined that the rule of Sandstrom was not applicable to this petition. Petitioner was sentenced to life imprisonment for conviction on first degree

premeditated murder charges on July 19, 1968. The Supreme Court has made clear that new rules of criminal procedure should not be applied on collateral review of criminal convictions, except in two circumstances, neither of which this Court finds applicable. Teague v. Lane, 489 U.S. ___, 109 S. Ct. 1060 (1989). In a recent decision, the Seventh Circuit determined that Sandstrom established a new rule for the purposes of Teague and could not be applied on collateral review. Prihoda v. McCaughtry, 910 F.2d 1379 (7th Cir. 1990). This Court agrees and rejects Petitioner's arguments that Sandstrom should apply.

Moreover, the Court finds no basis for Petitioner's claim that failure to explain "premeditation" to the the jury implicates federal due process.

Accordingly, the Court finds the Petitioner's objections to the Magistrate's Report and Recommendation unpersuasive and adopts the Magistrate's decision.

IT IS HEREBY ORDERED that the Magistrate's Report and Recommendaiton is ADOPTED and the Petition for Writ of Habeas Corpus is DENIED.

HORACE W. GILMORE
U.S. DISTRICT JUDGE

Dated: Oct 12 1990
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CLARK LESTER,
Petitioner,

v.

CIVIL NO. 89-CV-72420-DT
JUDGE HORACE W. GILMORE

GENE BORGERT,
Respondent.
_____/

MAGISTRATE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION:

The Court should deny the petition for a writ of habeas corpus.

II. REPORT:

A.

Petitioner, represented by counsel, has chosen to file an amended petition for a writ of habeas corpus, deleting from this petition issues this Court previously found unexhausted. He puts forward two grounds for relief from his conviction for first degree murder in 1968. First is a claim that the trial judge unconstitutionally shifted the burden of proof to him by instructing the jury that certain elements of the crime were presumed or implied by law. Second is a claim that the trial judge's instruction on premeditation shifted the burden of proof in violation of the Fourteenth Amendment.

B.

1. Petitioner quotes at length from the jury instruction, Brief, pp. 2-3, 5. He underlines the instructions, inter alia, which told the jury hearing his case that the law "presumes that every person, unless relieved by some disability, contemplates and intends the natural ordinary, and usual consequences of his voluntary act, unless of course, the contrary appears from the evidence," that is it were shown that a man had killed another by an act, the natural and ordinary consequences of which would be to produce death, "then it would be presumed that death of the deceased was designed by the slayer unless the facts and circumstances of the killing or the evidence creates a reasonable doubt in your minds whether the killing was done purposely," and that "when a man assaults another with a dangerous weapon, a deadly weapon, in such a manner that the natural, ordinary and probable use of such deadly weapon would take life, the law presumes that such person so assaulting intended to take life."

2. On June 18, 1979, the United States Supreme Court, on certiorari to the Supreme Court of Montana, reversed a conviction for deliberate homicide and remanded the case for a new trial because a Montana state court judge had instructed the jury that "[t]he law peresumes that a person intends the ordinary consequences of his voluntary acts." Sandstrom v. Montana, 442 U.S. 510, 513 (1979). The Court accepted Sandstrom's argument, which had been presented to and rejected by the trial judge, that the instruction was unconstitutional and fell afoul of a previous Supreme Court decision in Mullaney v. Wilbur, 421 U.S. 684 (1975). Sandstrom had also argued to the Montana Supreme Court that the instruction was prohibited by the decisions in Patterson v. New York,

432 U.S. 197 (1977), and In Re Winship, 397 U.S. 358 (1970). The Montana Supreme Court conceded that the cases cited by Sandstrom prohibited shifting the burden of proof by means of a presumption, but sought to distinguish the force of these decisions by arguing that they did not prohibit requiring a defendant to come forward with some evidence that he did not intend the ordinary consequences of his voluntary acts, which it believed was all the instruction required him to do. The United States Supreme Court rejected this reasoning. The Court began by determining "the nature of the presumption [the jury instruction] describes." Id. at 514. The Court concluded that Sandstrom's jury "could easily have viewed the instruction as mandatory," and that it [the jury] had no choice in the matter. Id, at 515. The Court then considered and rejected the state's argument that, even if labeled a mandatory presumption rather than a permissive inference, the instruction allowed the prsumption to be rebutted by the production of some contrary evidence and did not shift to Sandstrom the burden of persuasion with respect to any element of the offense. Id. at 515. The Court concluded that the jury could well have "interpret[ed] the instruction as automatically directing a finding of intent." Id. at 516.

> Petitioner's jury was told "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." They were not told that the presumption could be rebutted, as the Montana Supreme Court held, by the defendant's simple presentation of some evidence, nor even that it could be rebutted at all. Given the common definition of "presume" as 'to suppose to be true without proof', Webster's New Collegiate Dictionary 911 (1974), and given the lack of qualifying

> instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways.

Id. at 517.

3. It is possible that the jury instructions in the case at bar can be distinguished from that found to be invalid as a constitutional matter in Sandstrom. The trial jduge while repeatedly using the word "presumes" also repeatedly qualified his instruction by adding phrases such as "unless, of course, the contrary appears from the evidence" and "unless the facts and circumstances of the killing or the evidence creates a reasonable doubt in your minds whether the killing was done purposely." However, assuming arguendo that the instructions fall afoul of the Sandstrom rule, there are reasons why petitioner may not avail himself of this 1979 decision.

4. The principle reason is that the Supreme Court has now determined that new rules of criminal procedure should not be applied on collateral review of criminal convictions. Teague v. Lane, 489 U.S. ___, 109 S.Ct. 1060 (1989). There are two exceptions to non-retroactivity, one of which is described as encompassing decisions subsequent to a trial which require the observance of procedures implicit in the concept of ordered liberty. Id. The question becomes whether a jury instruction which uses the word "presumes" creates an impermissible risk of conviction of the innocent and implicates the fundamental fairness of the trial. In Sandstrom's case, the major defense presented was a claim that the killing, though admittedly occurring at the hand of the accused, was not done purposely or knowingly, as required to establish the crime of deliberate homicide under Montana law. In the

case at bar, petitionre's defense was a denial and an alibi, not a contention that the killing was accomplished without premeditation, malice aforethought, or any intent to kill. Thus, even assuming a Sandstrom violation, there was no impermissible risk of a wrongful conviction flowing from any sucherror, and Teague v. Lane, supra, bars the use of this 1979 decision, or even the 1970 and 1977 precursor decisions, to overturn the conviction in the case at bar, especially since, unlike Sandstrom, petitioner did not object ot the trial judge's instructions on this basis.

5. The separate ground urged as a basis for grantring the writ, Issue II at pages 8-11, fares no better. Petitioner did not raise the issue with the trial judge, nor did he immediately pursue it on appeal as a federal claim. In any event, a claimed failure to "explain" the word premeditation, especially in a case where the defense was denial and alibi, does not implicate federal due process standards. See generally Henderson v. Kibbe, 431 U.S. 145 (1977).

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties are hereby informed that objections may be filed to this Report and Recommendations within ten days of receipt of a copy thereof as provided for in 28 U.S.S. 636(b)(1)(c) and that failure to file objections may constitute a waiver of any further right of appeal. United States v. Walters, 638 F.2d 947 (6th Cir. 1981), states that "a party shall file objections with the district court or else waiver right to appeal." See Fed R.Civ.P. 72(b); Local Sub-Rule C-4(b).

PAUL J. KOMIVES
UNITED STATES MAGISTRATE

Dated Sept. 13, 1990

(2)

Supreme Court, U.S.
FILED
MAY 20 1991
OFFICE OF THE CLERK

No. 90-1696

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLARK LESTER,

Petitioner,

v

GENE BORGERT, Warden
Cotton Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I

DOES THE COURT HAVE JURISDICTION OVER THIS PETITION FOR CERTIORARI WHERE PETITIONER DID NOT OBTAIN A CERTIFICATE OF PROBABLE CAUSE?

II

DID THE DISTRICT COURT AND COURT OF APPEALS PROPERLY DENY A CERTIFICATE OF PROBABLE CAUSE?

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JURISDICTION

Respondent disputes that this Court has jurisdiction to review a petition for writ of certiorari as argued in the REASONS FOR DENYING THE WRIT.

STATEMENT OF THE CASE

Petitioner, Clark Lester, was jury convicted of first degree murder on July 10, 1968, in the Washtenaw County Circuit Court, contrary to Mich. Comp. Laws 750.316; MSA 28.548. On July 19, 1968, he was sentenced to mandatory life imprisonment.

On December 6, 1973, the Michigan Court of Appeals affirmed Petitioner's conviction in a published opinion. People v Lester, 50 Mich App 725 (1973), reh den, January 22, 1974.

On June 28, 1974, Petitioner, through appellate counsel, filed a delayed appli-

cation for leave to appeal in the Michigan Supreme Court. Leave to appeal in the Michigan Supreme Court was denied August 28, 1974. People v Lester, 392 Mich 791 (1974).

Petitioner subsequently filed several motions for new trial in the trial court in 1976 and June 1984, and sought leave to appeal in the state appellate courts. No leave to appeal was granted. See Court of Appeals No. 81987, Michigan Supreme Court No. 76303.

On August 11, 1989, Petitioner, through retained counsel, filed a petition for a writ of habeas corpus in the United States District Court, Eastern District of Michigan, Southern Division, Docket No. 89-CV-72420-DT. He raised three grounds for habeas relief claiming:

1) that the trial judge unconstitutionally shifted the burden of proof to him by instructing the jury that certain elements of the crime were presumed or implied by law; 2) that the trial judge's instructions on premeditation shifted the burden of proof to him; and 3) ineffective assistance of counsel. This petition was subsequently amended and the latter claim of ineffective assistance of counsel was deleted as unexhausted.

On September 30, 1990, Magistrate Paul J. Komives recommended denial of the writ principally on the ground that the rule of Sandstrom v Montana, 422 US 510 (1979), was not retroactively applicable to Petitioner's 1968 conviction on collateral review under this Court's holding in Teague v Lane, 489 US 288 (1989).

Magistrate's Report and Recommendation, at 4-5, Docket No. 89-CV-72420-DT.

Petitioner, through his same counsel, filed objections to the Magistrate's Report and Recommendation in that he quarreled with the Magistrate's application of the rule of Teague, supra.

On October 12, 1990, the District Court Judge, the Honorable Horace W. Gilmore, adopted the Magistrate's Report and Recommendation and denied the petition for a writ of habeas corpus in a Memorandum Opinion and Order, Docket No. 90-2420.

On November 12, 1990, Petitioner's counsel filed a notice of appeal and a motion for a certificate of probable cause. Judge Gilmore denied the latter by order dated November 19, 1990.

On November 23, 1990, Petitioner's counsel sought a certificate of probable cause in the United States Court of Appeals for the Sixth Circuit, which court denied the motion on January 25, 1991.

In this habeas corpus proceeding, Petitioner asserts that his constitutional rights were violated when the trial court gave certain jury instructions.

The killing leading up to Petitioner's conviction occurred on Thursday, February 22, 1968, when shortly after 9:00 p.m. Petitioner shot Robert Ray in the chest following a narrowly averted automobile collision at a traffic light in the City of Ypsilanti, Michigan.

John Larry Slone testified that he traveled to work with Petitioner and Irving Lester at about 2:50 p.m. on the day in question. Irving Lester was driving Jacky Slone's car. Trial Transcript, 156-158 (hereafter T). Later in the evening, Slone told his foreman that he felt sick and wanted to go home. Id. 158. After he punched out, he went over to Petitioner's work division and told Petitioner that he was leaving. Petitioner said that he would leave work too. T 158-159. Petitioner told him to get his (Petitioner's) car keys from Jacky Slone and to drive the car around to the exit gate. T 159-160. Petitioner met him there, got into his car and drove down Huron Street. At a red traffic light a car (1962 Ford) pulled partway into their lane in order to make a turn.

This caused Petitioner to swerve in order to avoid it. T 161. The driver of the other car gave Petitioner the "finger". Id. 161-162. Slone noticed that there were two other persons in the other car. Id. 162.

Petitioner turned his car around and followed the Ford which completed its turn at the light change. T 162. As Petitioner followed the Ford along Adams Street, he pulled a gun out from under his car seat. T 163, 182. Petitioner told Slone to roll his window down. Id. 163. When they were level with the Ford, the driver, who was getting out of his car, asked Petitioner what was the matter, what could he do for him. Petitioner said twice that "he could solve his problem for him right fast." T 163,

185. Petitioner then shot the other driver, Robert Ray, holding the gun at arm's length. T 164, 183. He saw the driver fall backwards. Petitioner drove off. Id. 163. John Slone recalled that just before Petitioner shot Ray, he told him (Slone) to lean forward in his car seat. He leaned forward almost to the dashboard and Petitioner fired the gun past him. T 164, 184-185.

The trial court instructed the jury on the elements of first degree murder, including the elements of intent, premeditation, and malice, to which no objections were made. T 414-415. Nor was an objection made when the trial court reinstructed the jury with respect to premeditation and possible verdicts. T 417.

REASONS FOR DENYING THE WRIT

PETITIONER HAS INCORRECTLY INVOKED THE COURT'S JURISDICTION UNDER 28 USC § 1254 BECAUSE NO CERTIFICATE OF PROBABLE CAUSE WAS GRANTED.

The chief requirement involved in invoking the United States Supreme Court's certiorari jurisdiction under 28 USC § 1241 is well established. This petition does not discuss jurisdiction even though it is a threshold question under the instant procedural circumstances. Furthermore, the decision of the District Court and the Court of Appeals to deny Petitioner a certificate of probable cause is consistent with the legal principles set forth in Barefoot v Estelle, 463 US 880, 892-893 (1983).

A. THIS COURT HAS NO JURISDICTION TO CONSIDER THIS PETITION FOR A WRIT OF CERTIORARI.

Petitioner is a state prisoner whose habeas petition was dismissed by the Federal District Court Judge and who was denied a certificate of probable cause by the Federal Judge and the Sixth Circuit Court of Appeals. In his jurisdictional statement, appellate counsel for Petitioner cites 28 USC § 1254(1). Section 1254(1) grants plenary jurisdiction to the Supreme Court:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ..."

Definition of "cases in the courts of appeals" does not extend to those where

the lower courts have not extended a certificate of probable cause. House v Mayo, 324 US 42, 44 (1945). More recently in Davis v Jacobs, 454 US 911, 912 (1981), the Supreme Court denied seventeen (17) petitions for writs of certiorari because the courts below had not issued certificates of probable cause explaining that:

> "Because none of the petitioners obtained a certificate of probable cause, none of these cases was properly 'in' the Court of Appeals and therefore 28 USC § 1254 [28 USCS § 1254] does not give this Court jurisdiction over the petitions for writs of certiorari."

Recent Supreme Court cases such as Davis, have focused discussions not on whether the Court has jurisdiction, there being no dispute that it does not, but on whether such defective petitions should be denied or dismissed. In Jeffries v

Barksdale, 453 US 914, 915 (1981), the dissenting opinion, in support of its position that such cases should be dismissed, observed that both Congressional enactment and court rule mandated a certificate of probable cause from the District Court as an "indispensible prerequisite" to an appeal in the Court of Appeals. See 28 USC § 2253 and Fed. Rule App. Proc. 22(b). The dissent concluded that:

> "[O]ur certiorari jurisdiction, however, extends only to '(c)ases in the courts of appeals.' 28 USC § 1254 [28 USCS § 1254]. Since there was no certificate of probable cause in this case, it was never 'in' the Court of Appeals. In the plain words of the statute, '(a)n appeal may not be taken to the court of appeals.' Since the case was never in the Court of Appeals we cannot review it by way of writ of certiorari to that court." 453 US at 914.

It is readily apparent that Petitioner has incorrectly invoked this

Court's jurisdiction under 28 USC § 1254 because no certificate of probable cause issued from the court below.

B. THE DISTRICT COURT AND COURT OF APPEALS PROPERLY DENIED PETITIONER A CERTIFICATE OF PROBABLE CAUSE.

Even if this Court were to exercise its surrogate authority, as noted in Davis, 454 US at 913, review would be functionally limited to the action of the Court of Appeals "in declining to allow an appeal to it." 28 USC § 1651.

In this habeas corpus proceeding, Petitioner was required to obtain a certificate of probable cause from the District Court or from a Court of Appeals judge. The request for a certificate or probable cause is based upon 28 USC § 2253 and Rule 22(b) of the Rules of

Appellate Procedure. Section 2253 provides that:

> "§ 2253. Appeal
>
> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> "There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

Congress established the requirement of a certificate of probable cause in

order to prevent frivolous appeals. The Supreme Court agreed in 1983 with the weight of authority in the Courts of Appeal which held that a certificate of probable cause should be granted where petitioner makes a "substantial showing of the denial of a federal right." Barefoot v Estelle, 463 US 880, 893 (1983) (and cases cited therein). In its discussion, the Court quoted language from a Second Circuit case on point, stating that this language "cogently sums up this standard":

> "In requiring a question of some substance, or a substance showing of the denial of [a] federal right, obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further."

Id. at n 4 (quoting Jones v Richmond, 245 F2d 234 (2d Cir, 1957), and Gordon v Willis, 516 F Supp 911 (ND Ga, 1980).

A motion for certificate of probable cause is addressed to the sound discretion of the district court; issuance is not a matter of right, and may be denied where it appears that the appeal is without substantial merit. Wilks v Young, 586 F Supp 413 (ED Wisc, 1984). Courts, in considering whether to issue a certificate of probable cause, should resolve doubts in favor of the petitioner. McKoy v Wainwright, 630 F Supp 122 (SD Fla, 1986). When the district court concludes that denial of the certificate is proper, it must state the reasons for its denial. Wilks v Young, 586 F Supp at 415.

The District Court below adopted the Magistrate's Report and Recommendation that the challenged jury instruction was distinguishable from that given in Sandstrom v Montana, 442 US 510, 513 (1979), which Petitioner relied upon, and stated its reasons why. Additionally, the District Court found that Petitioner was not entitled to habeas relief under the rule announced in Teague v Lane, 489 US 288 (1989). The "(a)pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system", 489 US at 309. The plurality in Teague held: "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be

applicable to those cases which have become final before the new rules are announced." Id. at 310. A majority of the Court in Penry v Lynaugh, 492 US ___; 109 S Ct 2954 (1989), embraced the plurality view. The rule was applied to both capital and non-capital cases in Saffle v Parks, 494 US ____; 110 S Ct 1257, 1258-59 (1990). The District Court further found that the two exceptions to the Teague rule did not apply to Petitioner's case. Memorandum Opinion and Order, at 1-2. District Court Docket No. 89-2420. Finally, the District Court found no showing of the denial of a federal right regarding a challenged jury instruction on premeditation.

The Court of Appeals denied a certificate of probable cause after giving the

case sufficient consideration to conclude that the holdings of the District Court were correct. In addition, the Court of Appeals pointed out, as a matter of academic argument only, that even if the challenged intent instruction did violate the rule of Sandstrom and even if the Sandstrom rule did apply retroactively, the error would be harmless under prevailing law, [Cook v Foltz, 814 F2d 1109, 1112-13 (6th Cir), cert den, 484 US 837 (1987)], because intent was not at issue in Petitioner's case. Given that retroactivity is a threshold question, Teague, 489 US at 300, the denials of a certificate of probable cause were clearly appropriate.

CONCLUSION

The Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,

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